86-670

No. _____

FILED
SEP 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1986.

EDWARD KANTORSKI,
Petitioner-Appellant,

v.

L.F.C. LEASING AND FINANCIAL CORP.,
Respondent-Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

MARTIN J. HANSBERRY,
132 Shore Drive #5
Winthrop, Massachusetts 02152.
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Attorney for Petitioner-Appellant

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether there has been a denial of petitioner's civil rights to due process of law and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution in the denial to the petitioner of his right to a trial by jury as set forth in Article Fifteen of the Massachusetts Constitution. Whether the state courts in their interpretation of a procedural rule, viz., Mass.R.Civ.P. 56 (Summary Judgment), improperly denied petitioner his right to a jury trial which he had timely and in accordance with statute demanded, by allowing respondent's motion for summary judgment although there were genuine issues as to material facts in the case.

Parties in Interest.

Edward Kantorski and L.F.C. Leasing and Financial Corp. are the only parties in interest.

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JURISDICTIONAL STATEMENT.

Grounds of Jurisdiction.

The case involves the liability of a guarantor or surety on a contract. The date of the entry of the Massachusetts Supreme Judicial Court sought to be reviewed is July 2, 1986. The date the notice of appeal was filed is September 26, 1986 in the office of the Clerk of the Supreme Judicial Court. A copy of the notice of appeal was also filed on the same date in the office of the clerk of the Massachusetts Appeals Court. The Fourteenth Amendment of the United States Constitution is believed to sustain the jurisdiction of this Court.

Constitutional Provisions and Statutes Involved.

The Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of Massachusetts, Article Fifteen:

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

Massachusetts Rules of Civil Procedure, Rule 56 (Summary Judgment):

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the ex-

piration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

Statement of the Case.

The respondent brought an action in contract in the Boston Municipal Court against one Robert Pace and the petitioner on April 9, 1976. Damages in the amount of $9,827.52 were sought on an equipment lease which the petitioner had cosigned

as an accommodation for his friend, Pace, who wanted to obtain a piece of printing equipment but who lacked the credit to get financing without a cosigner. Unknown to petitioner, Pace was in bankruptcy prior to the signing of the equipment lease. Pace made none of the required monthly payments, respondent demanded payments from petitioner who made several payments, borrowing money to do this and then could afford no more. Petitioner never used the equipment, never received any benefit from it nor was he ever reimbursed by Pace for the payments which petitioner had made.

Respondent repossessed printing equipment from Pace a short time later by means which respondent's counsel in one of his briefs characterized as "without a serious breach of the peace." At any event, the means used for repossession were not in compliance with the procedures required by Massachusetts law.

Petitioner who was acting *pro se* counterclaimed that respondent violated a duty to disclose to him highly negative credit information that it possessed with regard to Pace. Pace counterclaimed on grounds that the damages were usurious and wrongful repossession. Petitioner cross-claimed against Pace for fraud and misrepresentation. On July 11, 1977 the case was removed to Suffolk Superior Court.

Respondent moved for summary judgment against Pace and petitioner under Rule 56 of the Massachusetts Rules of Civil Procedure. After several years had passed, petitioner was stunned on April 4, 1980, when respondent entered into a stipulation of dismissal with prejudice with Pace who told the court he was bankrupt although no documentary proof was ever produced for the court. Petitioner protested but to no avail. On April 7, 1980, petitioner filed an amended counterclaim against respondent alleging an illegal repossession of the equipment, grounds previously asserted by the now-dismissed Pace.

On May 5, 1980, a Suffolk Superior Court allowed summary judgment against petitioner in the full amount claimed, viz., $9,827.52 together with interest from April 9, 1976. The counter-claim and amended counter-claim of the petitioner were dismissed.

Petitioner's motion to reconsider was denied. An appeal to the Massachusetts Appeals Court resulted in the case being returned to the Superior Court where on February 14, 1984, summary judgment was ordered exactly as it had been on May 5, 1980. Another appeal to the Massachusetts Appeals Court resulted in the Superior Court judgment being affirmed on April 23, 1986. An application for further appellate review was denied by the Supreme Judicial Court on July 2, 1986.

From the time that respondent filed its motion for summary judgment under Mass.R.Civ.P. 56, petitioner has at numerous hearings before judges of the Superior Court and the Appeals Court by affidavits, motions, briefs and oral arguments raised the question of the inappropriate application of Rule 56 since there are clearly a number of genuine issues as to material facts in the case. Apparently, these genuine issues as to material facts were not recognized as such by the Superior Court judge on May 5, 1980, and various other judges of the Superior Court and the Appeals Court have not seen fit to change what the petitioner believes was a denial of his civil rights, i.e., to a jury trial.

Reasons Why Questions Presented are so Substantial as to Require Plenary Consideration.

Rules such as Mass.R.Civ.P. 56 obviously serve a vital need in federal and state courts in disposing of cases which otherwise would be sitting on dockets for years and needlessly taking time from cases which require trial by judge or jury. This

desirable goal has not been the result here which is new in its eleventh year in the various courts of the Commonwealth of Massachusetts. Here is a case which we submit never would have required a great deal of time in a trial court and yet, through what the respondent believes is a misapplication or misinterpretation of a salutary procedural rule, justice has been delayed and denied.

Plenary consideration should be given to this case because of the tremendous number of cases which are being decided by the application of Mass.R.Civ.P. 56 or similar rules in this and other jurisdictions.

Respectfully submitted,

MARTIN J. HANSBERRY,
132 Shore Drive #5,
Winthrop, Massachusetts 02152.
(617) 846-9178
Attorney for Petitioner-Appellant

Appendices.

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Appendix A.

**SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.**

Office of the Clerk,
1412 Court House,
Boston 02108,
(617) 725-8055

No: FAR-3922 July 2, 1986

L.F.C. LEASING AND FINANCIAL CORP.

VS.

EDWARD KANTORSKI

In the Application for Further Review an Order has been entered that the Application is DENIED.

Jean M. Kennett, Clerk

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, April 23, 1986.

In the case of L.F.C. LEASING AND FINANCING CORP. *vs.* EDWARD KANTORSKI pending in the Superior Court for the County of Suffolk.

ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed without costs or additional attorneys fees.

BY THE COURT,

/s/ Nancy Turck Foley, CLERK

April 23, 1986

NOTE:
The original of the within rescript will issue in the course, pursuant to M.R.A.P. 23.

Appeals Court

Appendix C.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 85-720

L.F.C. LEASING AND FINANCIAL CORP.

vs.

EDWARD KANTORSKI.

MEMORANDUM AND ORDER

The plaintiff's claim is based upon an equipment lease signed in 1975. The one defendant remaining in the case, Edward Kantorski d/b/a Linear Electronics Company, appeals from a judgment entered against him in the Superior Court in the amount of $9,827.52, plus interest.

The procedural history of the litigation is complicated. Originally filed in the Boston Municipal Court in 1976, the case was removed to the Superior Court on July 11, 1977. One Robert V. Pace, Victor Publishers, Inc., and Kantorski were named as defendants. As of July 11, 1977, the plaintiff, an equipment leasing company, had filed a motion for summary judgment, accompanied by an affidavit. On April 8, 1980, the plaintiff entered into a stipulation of dismissal with Pace and Victor Publishers, Inc. On May 5, 1980, a hearing was held on, among other things, the plaintiff's motion for summary judgment.

The judge had before him an affidavit signed by the president of the plaintiff corporation claiming personal knowledge of the relevant transactions and of the company's books and rec-

ords. The affidavit included the statement that "[o]n or about July 10, 1975, the defendants leased equipment on which there is now a balance due of $9,827.52, together with interest." Also before the judge was a copy of the equipment lease bearing Pace's signature on behalf of Victor Publishers Inc. as a lessee, and also Kantorski's signature as a co-lessee. The rent obligations were stated in that document, and the "default" provisions set forth numerous cumulative remedies available to the lessor in the event of a default in the payment of rent. Also before the judge were an affidavit of Kantorski and a transcript of a deposition he had given in 1976. In both of those documents Kantorski acknowledged the following: that he had signed the lease; that he had made several monthly rent payments; that the equipment called for in the lease had been provided to Pace; that he had signed the lease in order to help Pace, whom he knew to be having financial difficulties, obtain the equipment for use in his business; that payments due under the lease had not been made; that he knew that he was obligated to pay the rent; and that, although he regarded the amount sought by the plaintiff to be excessive, he had no opinion as to the exact amount due. Appearing *pro se*, Kantorski argued, with no factual support other than his affidavit and deposition testimony, that summary judgment against him should be denied because the plaintiff had entered into the lease with Victor Publishers, Inc., when that corporation was in bankruptcy and that the plaintiff had failed to disclose to Kantorski that Pace was in financial difficulty at the time the lease was signed. The motion for summary judgment was allowed in the full amount requested.

A hearing was held at the same time on the plaintiff's request that Kantorski's amended counterclaim be dismissed. The judge treated the amended counterclaim as a motion for leave to amend, see Mass.R.Civ.P. 15(*a*), 365 Mass. 761 (1974), and denied it. He also dismissed the counterclaim.

A motion for reconsideration of the rulings was heard and denied by another Superior Court judge on September 29, 1980. Kantorski was represented by counsel at the hearing on the motion for reconsideration, and he has been represented by counsel at all subsequent proceedings.

An appeal was taken to this court, but it was dismissed on May 25, 1983, because less than all of the pending claims had been adjudicated and there had been no determination, as required by Mass.R.Civ.P. 54(*b*), 365 Mass. 821 (1974), that there was no just reason for delaying Kantorski's appeal. Upon remand to the Superior Court, there was a further request for reconsideration of the rulings which, after hearing, was denied. A motion for entry of a separate final judgment as to the plaintiff's claim against Kantorski, however, was allowed, and this appeal ensued.

1. Summary judgment was properly granted on May 5, 1980. The elements of the plaintiff's claim were established by the only factual material properly before the judge. Contrary to Kantorski's assertion, when a claim is made based upon a lease, the bankruptcy of a lessee is not a defense to another party who signed the lease as a co-lessee. Nor did the plaintiff leasing company, as Kantorski maintains, have a duty to disclose to him what the plaintiff may have known about the financial predicament of Pace or his corporation. See *Swinton* v. *Whitinsville Savings Bank*, 311 Mass. 677, 678 (1942). Even if the plaintiff had such a duty, Kantorski's own statements, made under oath, reveal that he has well aware at the relevant times of Pace's financial difficulties.

The damage award of $9,827.57, plus interest, is more troublesome than the issue of liability. The total payments due under the lease were $7,681.20 of which $1,123.17 had been paid before suit was brought. Included in the $9,827.52 is the total unpaid rent for the entire term of five years, late charges, a charge based upon a formula for computing the residual

equipment value at the end of the term, costs, and attorney's fees. Moreover, it is undisputed that in 1976 the plaintiff repossessed the equipment. Cumulative remedies available upon default, including the right to repossess the equipment, however, were spelled out in the contract. There was support in the material before the judge for the amount of unpaid rent and attorney's fees, and the other items included in the award could easily be computed. Kantorski did not raise at the appropriate time the issue of the possible excessiveness of the damages being sought or of the unconscionability of the contract remedies.

Unquestionably, the plaintiff, having repossessed the equipment, had a duty to act reasonably to mitigate damages by attempting to lease the equipment during the remainder of the term. However, "[t]he burden of proving that losses could have been avoided by reasonable efforts rests with the party in breach." See *American Mechanical Corp.* v. *Union Machine Co. of Lynn, Inc.*, 21 Mass. App. Ct. 97, 103 (1985), and cases cited. Given the limited record before us on the issue of the validity of the damage award, we lack the familiarity with the factual setting necessary to enable us to rule that the judgment was not proper. See *Patriot General Life Ins. Co.* v. *CFC Inv. Co.*, 11 Mass. App. Ct. 857, 862 n. 6 (1981). Although we do not condone the award of duplicative damages, even where provided for in a written agreement, the issue of unconscionablilty or excessiveness, to be successful, must be raised properly in the trial court, and it must be adequately supported by facts. *Royal Indemnity Co.* v. *Blakely*, 372 Mass. 86, 87-88 (1977).

2. In view of its lateness, its vagueness, and its probable lack of merit, see *Penney* v. *First National Bank of Boston*, 385 Mass. 715, 718 (1982), the judge properly exercised his discretion in denying Kantorski's motion for leave to amend the counterclaim. The counterclaim as originally filed failed

to state a claim upon which relief could be granted, Mass.R.Civ.P. 12(*b*) (6), 365 Mass. 755 (1974), and was properly dismissed.

Therefore, upon consideration of the appendix, oral argument, and briefs, it is ordered, under Rule 1:28, that the following entries be made on the docket of the Superior Court in the above matter:

Judgment affirmed without costs or additional attorneys fees.

By the Court: (Kaplan, Kass & Fine, JJ.)
/s/Nancy Turck Foley
Clerk

Entered:

Appendix D.

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

No: FAR-3922

L.F.C. LEASING AND FINANCIAL CORP.,
PLAINTIFF-APPELLEE

VS.

EDWARD KANTORSKI
DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward Kantorski, the appellant above named hereby appeals to the Supreme Court of the United States from the order entered by this Court on July 2, 1986 which denied further review of his application for further review of the denial by The Massachusetts Appeals Court appeal from the Massachusetts Superior Court.

This Appeal is taken pursuant to Title 28 U.S. Code Section 1257, Subparagraph (2).

By his attorney,
/s/Martin J. Hansberry
Atty. Martin J. Hansberry
132 Shore Drive #5
Winthrop, MA 02152
(617) 846-9178

CERTIFICATE OF SERVICE

I, Martin J. Hansberry, hereby certify that I have this date, hand delivered the above Notice of Appeal to the office of the Clerk of the Massachusetts Supreme Judicial Court and a copy thereof to the office of the Clerk of Massachusetts Appeals Court and mailed a copy of this Notice of Appeal to James A. Weisman, Esq., Suite 1120, 11 Beacon St. Boston, MA 02108, first class, postage prepaid.

/s/Martin J. Hansberry
Atty. Martin J. Hansberry
132 Shore Drive #5
Winthrop, MA 02152
(617) 846-9178

Sept. 26, 1986

Appendix E.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, SS

LFC Leasing and Financial Corp., Plaintiff-Appellee	Application For Further Appellate Review Under Appellate Rule 27.1
vs.	
Edward Kantorski, Defendant-Appellant	

1. Edward Kantorski, Defendant-Appellant, hereby requests leave to obtain further appellate review founded upon substantial reasons affecting both the public interests and the interests of justice.

2. The statement of prior proceedings is fairly set forth in the Appeals Court's "Memorandum and Order."

3. Also fairly set forth is a statement of facts by the Appeals Court with one notable exception i.e. the facts relating to the forcible repossession of the leased printing machine, the subject matter of this case, which in the words of the Appellee's brief was accomplished "without serious breach of the peace."

4. Statement of the points with respect to which further Appellate Review of the Appeals Court is sought.

I. Whether summary judgment was properly allowed where there were substantial issues of material fact concerning the

nature of the transaction, the nature of the Defendant-Kantorski's obligation and the amount of damages properly due.

II. Whether the illegality of the contract between the Plaintiff and Defendant, Victor Publishers, Inc. is a complete defense to the Defendant Kantorski.

III. Whether the contract is unenforceable because its terms are unconscionable and amount to a penalty.

IV. Whether the damages are excessive due to the failure of the plaintiff to mitigate damages.

V. Whether the lower court erred in denying Defendant-Kantorski's Motion to file and Amended Counter Claim based upon wrongful repossession of the collateral.

VI. Whether the lower court erred in dismissing the Counterclaim of the Defendant-Kantorski.

VII. Whether the Defendant-Kantorski was discharged from liability under the contract by the release of the Defendant Robert Pace and Victor Publishers, Inc. by agreement and approval of the Plaintiff.

5. Brief Statement indicating why further Appellate Review is appropriate.

A. The were genuine issues of material fact presented by affidavits, pleadings, depositions and answers on file. Rule 56 precludes the allowance of a motion for summary judgment where there are genuine issues of material fact and when the party opposing the motion has alleged facts relating to the transactions on which suit has been brought which raise issues entitling him to a trial. *Community National Bank* v. *Dawes*, 369 Mass. 550, 551 (1976).

B. The transaction in the instant case has been variously referred by the parties as a note, a lease, a lease agreement, a lease contract and equipment lease. The true character of the agreement is a question of fact to be decided by a trial court. G.L. C. 106 Sect. 1-201.

To distinguish between a lease and a security in the guise of a lease (and thus controlled by Article 9 of the Uniform Commercial Code) it is necessary to determine the parties intent. *Granite Equipment Leasing Corp. v. Acme Pump Co.*, 335 A.2d (Conn. 1973).

The significance of the application of Article 9 of the Uniform Commercial Code is that it would provide a defense to Kantorski based on the failure of LFC to comply with the Uniform Commercial Code regarding a peaceable repossession. (G.L. c. 106, Sec. 9-503), notification of sale (G.L. c. 106, Sec. 9-504) and the application of the proceeds of sale to the indebtedness (G.L. c. 106, Sec. 9-504). In the present case there was a forceable repossession and no notification regarding the disposition of the collateral or any application of proceeds to the indebtedness.

C. The Plaintiff was given summary judgment in the amount $9,827.52 plus interest, the amount sought in its complaint. There was no evidence produced in support of the motion for summary judgment as to the breakdown of the damages claimed.

The Defendant contends that the damages awarded in this case were excessive due to failure of LFC to mitigate damages by either re-leasing or selling the collateral and applying the proceeds to the debt.

The total rental for the five year term of the contract was $7,681.20, a figure that must have approximated the sales price plus interest. The equipment was repossessed within the first year. Yet there is not one iota of evidence in the record showing a re-lease or resale of the equipment or any application of proceeds to the debt. Simple arithmetic belies the application of any proceeds.

	$7,681.20	total due under contract
Less	$ 640.10	payments by Defendant-Kantorski
Less	$ 483.17	security deposit by Pace
	$6,557.93	balance due

However the amount claimed and allowed by the lower court was $9,827.52. There was obviously no deduction for this one-year old printing equipment which LFC had repossessed.

LFC had duty to mitigate damages by either re-leasing or reselling the equipment and applying the proceeds to the debt. Not only was there a contractural duty under the lease contract but there was a duty under principles of surety law, *Restatement: Security* Sec 131 (2). In addition if this transaction is held to be a security interest, there is a statutory duty to dispose of the collateral and apply the proceeds to the debt. (G.L. C. 106, Sec. 9-504.)

D. The lower court denied Kantorski leave to amend his counterclaim to assert damages for the forceable repossession of the collateral. The Defendant Kantorski contends that the Motion to amend should have been allowed in the interest of justice. The subject matter of the amendment, the wrongful repossession was not new to the case. It was part of Pace's counterclaim from the beginning. The reason for Kantorski's delay in bringing the amendment to the counterclaim was clear as well. Up until that time, Pace and Victor Publishers, Inc. were parties to the action and they had asserted that claim. When Pace and Victor Publishers, Inc. were suddenly dismissed from the action by the lower court with the approval of LFC, Kantorski saw the need to assert the claim in his own behalf.

It is clear that Kantorski had a valid cause of action against LFC based upon the tortious and forceable repossession of the collateral from Victor Publishers, Inc. See *Stone Machinery Co. v. Kessler*, 463 P.2d 651 (Wash. App. 1971) where a repossession virtually identical to the case at bar was held to

constitute a conversion (forceable repossesion over protest of buyer where seller secured aid of local police officer). See *Annot*: What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability. 99 A.L.R. 2d 358-389. Kantorski had standing to assert the conversion because he had a property interest in the converted property. *Laurin v. DeCarolis Constr. Co.*, Mass. Adv. Sh. (1977) 1207, 1209. In addition, Kantorski had standing to assert the claim as surety. *Restatement: Security*, 133 (2).

The measure of damages for the conversion would at the least have been the market value of the property at the time of conversion plus interest. *Koski v. Haskins*, 236 Mass. 346, 348 (1920).

The Defendant contends that leave to amend the counterclaim should have been allowed because "leave shall be freely given when justice so requires." MRCP 15(a). Justice required the amendment here where the claim was not new to the case (and thus no prejudice to LFC resulted) where Kantorski was compelled to assert the claim because of the eleventh hour dismissal of Pace and Victor Publishers, Inc. and where the claim was a valid and substantial one for a Defendant in a very unfortunate circumstance.

E. The lower court dismissed the counterclaim for failure to state a claim. The dismissal of the counterclaim was error because the counterclaim alleged a valid cause of action. The counterclaim alleged that LFC withheld from Kantorski highly negative credit information concerning the principal obligor, Pace. LFC contended that the counterclaim failed to state a claim because it had no duty to disclose any information to Kantorski. *Restatement: Security*, Sec 125 (1) provides that a creditor has a duty to disclose to the surety facts, known to it, that materially increase the risk beyond which the creditor has reason to believe the surety intends to assume. The failure to disclose those facts is a defense to the surety. *Town of*

Hudson v. Miles, 185 Mass. 582 (1904). Kantorski, accordingly, says that the motion to dismiss his counterclaim should have been denied.

F. Kantorski contends that the entry of a stipulation of dismissal between LFC and Pace and Victor Publishers, Inc. was a release of the principal and operated to discharge Kantorski as the surety under applicable law.

As stated above Pace and Victor Publishers, Inc. asserted a counterclaim against LFC based on the wrongful repossession of the collateral. This constituted a valid cause of action against LFC. Several weeks prior to the hearing on the motion for summary judgment, LFC, Pace and Victor Publishers, Inc. entered into a stipulation of dismissal, dismissing the complaint and the counterclaim *with prejudice*. The dismissal of the counterclaim was sufficient consideration for the dimissal of the complaint, so that the stipulation of dismissal operated as a release to the principal obligor under the contract, Victor Publishers, Inc. There was no requirement that LFC dismiss Victor Publishers, Inc. as party because of the bankruptcy proceedings. The filing of the bankruptcy petition only stayed the State Court proceedings against Victor Publishers, Inc. Importantly, Victor Publishers, Inc. did not get discharge from the Bankruptcy Court. The discharge was denied. Victor Publishers, Inc. was, thus still liable on the LFC claim. In addition, Pace was not even a party to the bankruptcy proceedings when the stipulation of dismissal was entered into.

It is a principle of the law of surety that a release or a covenant not to sue the person known by the creditor to be the principal will discharge the surety. *Karcher v. Burbank*, 303 Mass. 303, 308 (1939). The only exceptions to this rule are where the creditor expressly reserves his rights in the release against the surety or where the surety consents to remain liable notwithstanding the release. Neither exception applies here.

While this express ground of defense was not raised in the lower court, the Defendant asks this Court to consider this issue in the interest of justice. The Defendant-Kantorski was acting pro se at the time. He was surprised by the 11th hour dismissal of Pace and Victor Publishers, Inc. and he told that to the lower court. It was obvious that Kantorski had not yet "digested" what the effect of the stipulation of dismissal, but he knew that there was "something going on." The lower court was clearly advised of the facts constituting this defense — the entry of the stipulation of dismissal. In the interests of justice and fairness, Kantorski asks this Court to consider this issue along with all the other issues raised and grant him his "day in court".

Respectfully submitted
Edward Kantorski
By his attorney,
/s/Martin J. Hansberry
Atty. Martin J. Hansberry
132 Shore Drive #5
Winthrop, MA 02152
(617) 846-9178

Appendix F.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

APPEALS COURT
NO. 850720

L.F.C. LEASING AND
FINANCIAL CORP.
vs
EDWARD KANTORSKI

PETITION FOR
REHEARING UNDER
APPELLATE RULE 27

JUSTICES BENJAMIN KAPLAN,
RUDOLPH KASS AND
EDITH W. FINE

There are many matters which could be addressed in this letter of petition for rehearing, but further repetition does not seem appropriate since I have previously covered these matters to the best of my ability in my brief and appendix to this court.

However, Justices Kaplan and Fine, in my time for oral argument you both expressed interest and surprise in that the repossessed printing machine seemed to disappear in this case. Attorney Weisman for L.F.C. said that he knew nothing about it, and I recall that you, Justice Kaplan, suggested that it might be a "museum piece" by now. The opinion in this case never mentioned this repossessed printing machine which L.F.C.'s attorney stated in his brief had been repossessed in his words "without serious breach of the peace."

I have one question to ask you Justice Kaplan and Justice Fine, why?

Respectfully submitted
Edward Kantorski
By His Attorney
/s/Martin J. Hansberry
Martin J. Hansberry
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